

No. 1185 (52)

APR 26 1952

Supreme Court of the United States

Plaintiff

October Term, 1951

CANADIAN PACIFIC RAILWAY CO.

Defendant, Petitioner

DENNIS SULLIVAN et al.

Plaintiffs, Respondents.

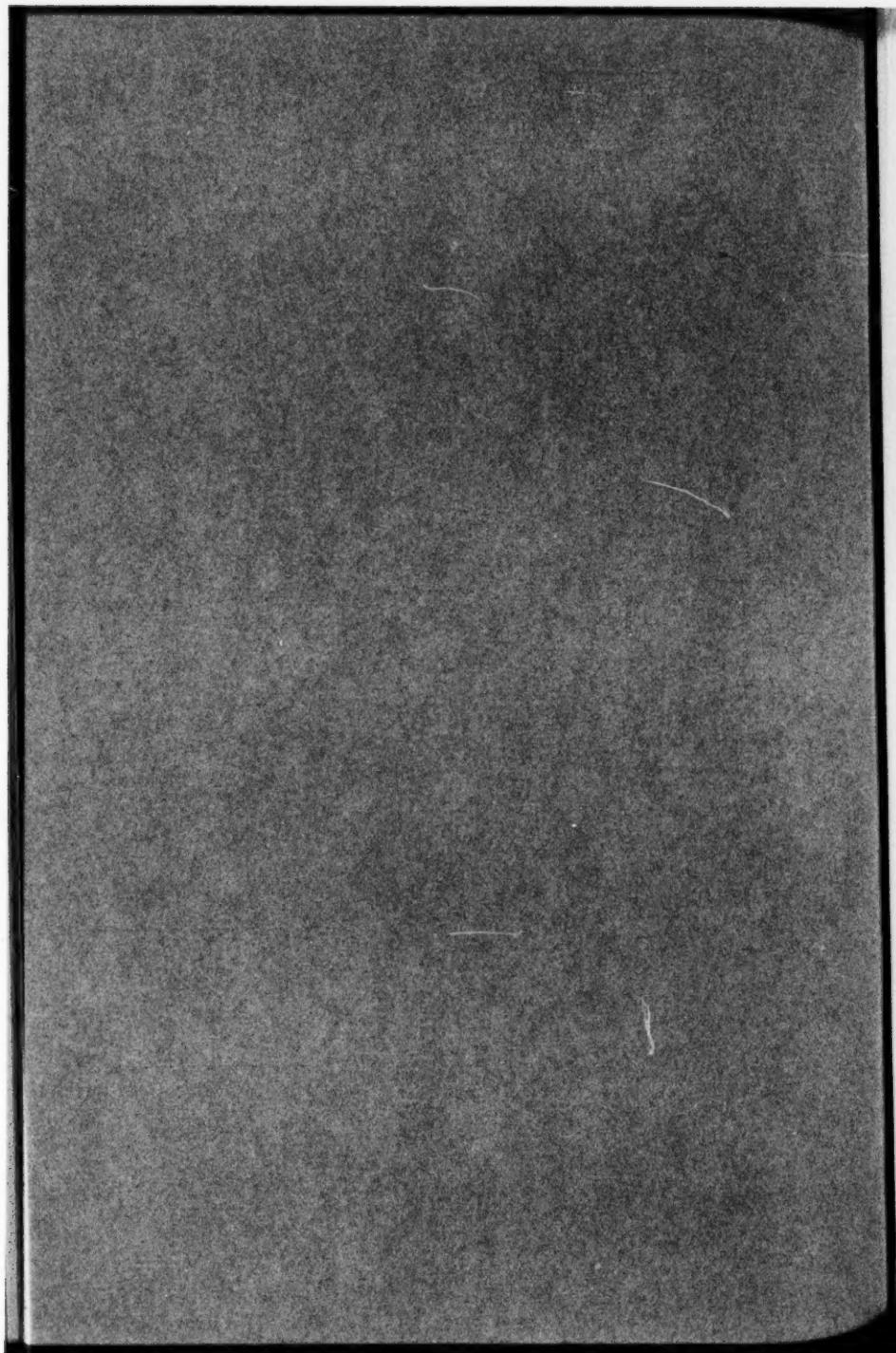
**PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT**

AND

BRIEF IN SUPPORT THEREOF.

RICHARD W. HALL,

Attorney for Petitioner.



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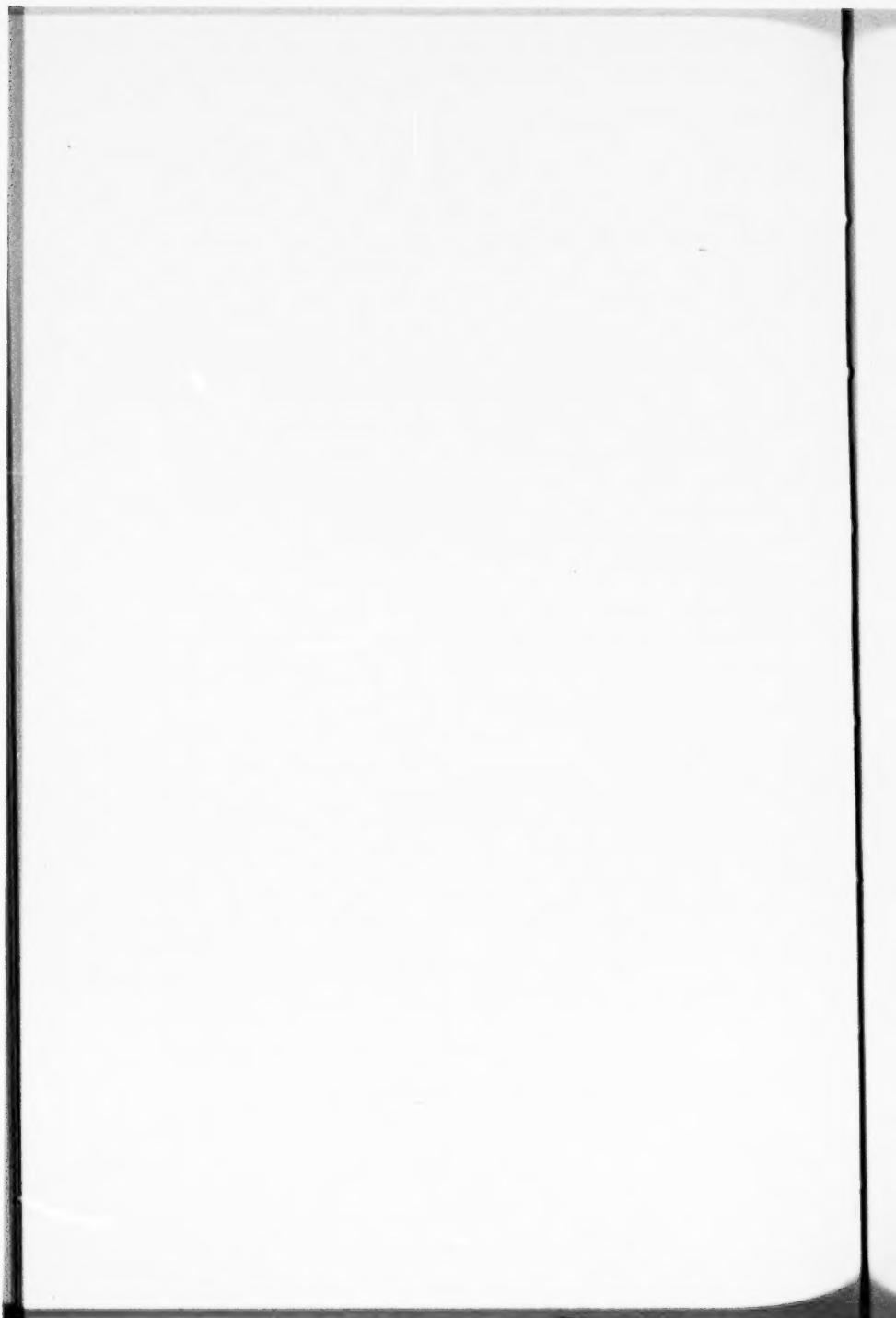
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Supreme Court of the United States.

OCTOBER TERM, 1941.

CANADIAN PACIFIC RAILWAY COMPANY,

Defendant, Petitioner,

v.

DENNIS SULLIVAN ET AL.,

Plaintiffs, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now comes the Canadian Pacific Railway Company, a corporation duly organized by law and having an usual place of business in Montreal, in the Province of Quebec, Dominion of Canada, and respectfully petitions this Court to issue a writ of certiorari directed to the Circuit Court of Appeals for the First Circuit, and in support of its petition respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

These are two actions of tort consolidated in the Circuit Court of Appeals, one to recover for the death of Annie Sullivan, and the other to recover for personal injuries of Margaret Sullivan sustained in a collision between a passenger train of the petitioner and an automobile in which the respondents were riding. For brevity and convenience both Annie Sullivan and Margaret Sullivan will be referred to as plaintiffs or respondents. The plaintiffs were and are residents of the Commonwealth of Massachusetts. The accident occurred at a grade crossing at or near the Town of Yamachiche in the Province of Quebec, Dominion of Canada. The petitioner is a foreign railroad corporation operating lines of railroad between various states of the Union, but having no lines of railroad in Massachusetts and having no place of business in Massachusetts other than an office which it maintains for the solicitation of business in the City of Boston, Commonwealth of Massachusetts. The two actions were originally commenced in the Superior Court for Bristol County, Massachusetts. The Boston and Maine Railroad and the New York, New Haven & Hartford Railroad were named as alleged trustees and served with the writs, after which the writs were served on the Commissioner of Corporations for the Commonwealth of Massachusetts as agent for service of process of the Canadian Pacific Railway. The petitioner filed an answer in abatement and a motion to dismiss in each case and removed the cases to the District Court of the United States for the District of Massachusetts on the ground of diversity of citizenship. The motion to dismiss and answer in abatement in each case were heard by Judge McLellan, who overruled both and held that the petitioner was liable to service of process in Massachusetts. The two cases were then tried

before Ford, J., in the District Court to a jury. The petitioner seasonably presented motions for directed verdicts, which were denied, and the cases were submitted to the jury. The jury returned a verdict for \$8000 in the case of Annie Sullivan, who was killed, and \$2000 in the case of Mrs. Margaret Sullivan, who was injured.

The petitioner then filed in each case a motion for judgment notwithstanding the verdict and a motion for a new trial, each of which was denied by Judge Ford in the District Court. The alleged trustee New York, New Haven & Hartford Railroad was discharged and the Boston and Maine Railroad was charged as trustee with funds in its possession, the property of the principal defendant. Appeals were then perfected to the Circuit Court of Appeals, in which the petitioner urged, first, that the petitioner was not subject to service of process in Massachusetts, on the grounds (1) that the petitioner was not doing business in Massachusetts, (2) that the statute requiring foreign corporations coming into Massachusetts for the purpose of doing business to appoint the Commissioner of Corporations its agent for service of process was unconstitutional if applied to a non-resident interstate carrier by railroad and was repugnant to both the Due Process Clause and the Commerce Clause of the Constitution; second, that there was not sufficient evidence to submit to the jury on the question of the petitioner's negligence, and third, that the Court erred in overruling the defendant's motions for directed verdicts, its motions for judgment notwithstanding the verdict and its motions for a new trial.

The Circuit Court of Appeals, by an opinion dated March 2, 1942, dismissed the appeals and ordered judgment entered for the respondents with costs.

II.

The Jurisdiction of the United States Supreme Court.

The jurisdiction of the United States Supreme Court is properly invoked on four grounds:

- (a) To review the action of the courts below sustaining the constitutionality of the statutes of Massachusetts.
- (b) To review the decision of the Circuit Court of Appeals sustaining the jurisdiction of the District Court contrary to the provisions of the Fifth Amendment and of the Commerce Clause of the Constitution and to the decisions of the Supreme Court of the United States.
- (c) To review the written opinion of the Circuit Court of Appeals, which is at variance with the law as laid down by the United States Supreme Court, the laws of the various other Circuits and the laws of the various States.
- (d) To review the sufficiency of the evidence in the record to support a verdict by the jury.

III.

Questions Presented.

Three questions are presented for consideration by this Court:

- (a) Whether the petitioner was subject to service of process in Massachusetts.
- (b) Whether there was sufficient evidence of negligence on the part of the petitioner, its agents or servants, to submit to the jury.
- (c) Whether the opinion of the Circuit Court of Appeals should be allowed to become the law of the land.

IV.

Reasons for Granting the Writ.

(a) The petitioner urges that no jurisdiction was procured over it because—

1. It was not doing business in Massachusetts.
2. The statute under which jurisdiction was claimed was unconstitutional and repugnant to the Fifth Amendment and to the Commerce Clause of the Federal Constitution.

(b) The effect of the Circuit Court of Appeals opinion is repugnant to the Fifth Amendment to the Federal Constitution in that it deprives the petitioner of property without due process of law.

(c) The effect of the Circuit Court of Appeals opinion is contrary to the recognized procedure for trial by jury.

(d) The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court and the decisions of other Circuit Courts of Appeals and State Courts.

Only the questions herein specifically brought forward will be considered.

Wherefore the petitioner prays that a writ of certiorari issue directing the Circuit Court of Appeals for the First Circuit to certify the record to this Court.

RICHARD W. HALL,
Attorney for Defendant, Petitioner.

BRIEF IN SUPPORT OF PETITION.

As there are two basic questions raised, namely, the sufficiency of jurisdiction over the petitioner and the sufficiency of the evidence to submit to the jury, the brief will naturally be divided into two parts. The opinion of the judge of the District Court overruling the petitioner's motion to dismiss for want of jurisdiction and its answer in abatement is found in 22 Fed. Supp. 95, and is in the record, at page 37. The opinion of the Circuit Court of Appeals was dated March 2, 1942, and a copy is in the record, beginning at page 107.

I.**Jurisdiction.**

The United States Supreme Court has authority to examine into and determine the question of jurisdiction over the petitioner.

28 U.S.C. sec. 347 (a).

Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264.

James-Dickinson Co. v. Harry, 273 U.S. 119.

The Supreme Court of the United States also has authority to review the record and determine whether or not the evidence disclosed was properly submitted to the jury, because a writ of certiorari to the Circuit Court of Appeals brings up the whole case including questions affecting the merits as well as those concerning the jurisdiction of the District Court.

Camp v. Gress, 250 U.S. 308.

Kendall v. Ewert, 259 U.S. 139, 143.

II.

Statement of the Case as it Affects the Jurisdiction of the Local Court over the Petitioner.

It is admitted that the respondent Margaret S. Sullivan and the intestate Annie Sullivan were at the time of the accident residents of Massachusetts and that Margaret Sullivan and the ascendant heirs of Annie Sullivan continued to be residents of Massachusetts. It is admitted and found in the decision that the petitioner, Canadian Pacific Railway Company, is a corporation duly organized under the laws of the Dominion of Canada and operating lines of railroad between several states of the Union and in Canada and that it maintains in Boston an office for the solicitation of business. A complete description of the kind of business carried on in that office is contained in the opinion of the District Court. The accident out of which the causes arose occurred at or near Yamachiche in the Province of Quebec, Dominion of Canada, while the respondents were on a motor trip through Canada. Service was made on the New York, New Haven & Hartford Railroad and the Boston and Maine Railroad as alleged trustees, and subsequently on the Commissioner of Corporations for the Commonwealth of Massachusetts as agent for the service of process of the principal defendant. Such service on the Commissioner of Corporations was in accordance with the provisions of the Massachusetts statute, General Laws (Ter. Ed.) chapter 181, sections 3-5. The petitioner's motions to dismiss are found in the record at page 7, and answers in abatement are found in the record at page 9. The District Court ruled, on the authority of *Stein v. Canadian Pacific Ry. Co.*, 298 Mass. 479, that the petitioner was doing business in the Commonwealth of Massachusetts. It is conceded that service of process was made in the manner provided by the statute, Massachusetts General Laws, chapter 181, section 3. The

petitioner attacked the jurisdiction on two grounds: First, did the Massachusetts legislature intend the statute to apply to a non-resident interstate carrier by railroad in a case in which the cause of action not only arose outside of the Commonwealth but which also was wholly unconnected with any business done there by the defendant and second, if the legislature did so intend, can the statute be constitutionally applied to this petitioner?

III.

The Statute.

Massachusetts General Laws, chapter 181, section 3, provides as follows:

“SECTION 3. Every foreign corporation, which has a usual place of business in this commonwealth, or owns real property therein without having such a usual place of business, or which is engaged therein, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, or in the construction or repair of roads or highways, shall, before doing business in this commonwealth, in writing appoint the commissioner and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth.”

On the question of the scope of the statute, the Circuit Court of Appeals for the First Circuit said (Record, page 110): "This is a question of state law which, although direct authority appears to be lacking, we believe should be answered in the affirmative. We base our conclusion upon the decision of the Massachusetts Supreme Judicial Court in *Johnston v. Trade Insurance Co.*, 132 Mass. 432, and also upon the decisions of that Court construing Section 38 of Chapter 223 of the Massachusetts General Laws to be referred to hereafter." The Court then goes on to review various decisions of the Massachusetts Supreme Court construing a different statute, namely, General Laws, chapter 223, section 38, and says (Record, page 111): "The foregoing considerations lead us to believe that the Massachusetts Court would interpret the Statute under consideration to include actions like the present in so far as constitutional limitations permit." It appears, therefore, that the Circuit Court of Appeals, by analogy to cases decided under a different statute, has decided that the scope of the present Massachusetts statute did include this petitioner.

Although the cases were cited to the Circuit Court of Appeals in the petitioner's brief, that Court ignored those cases where the Massachusetts Supreme Court had expressly construed chapter 181, section 3, and decided that it did not apply to a non-resident interstate carrier by railroad.

2 Opinions Attorney General, 440.

Garvey v. Wesson, 258 Mass. 48, 51.

Koontz v. Baltimore & Ohio R.R. Co. & Trustee,
220 Mass. 285.

In *Garvey v. Wesson*, 258 Mass. 48, 51, the Supreme Court of Massachusetts, in considering the same statute, stated:

"If the transaction was, in and of itself, foreign commerce, we have no doubt that the demurrers should have

been sustained. This court has, in substance, determined that the statutes (Sts. 1884, c. 330; 1895, c. 157; 1900, c. 280; 1903, c. 437) which go to make up the present G. L. c. 181, § 5, are not to be taken to apply to foreign corporations engaged solely in interstate commerce."

In *Koontz v. Baltimore & Ohio R.R. Co. & Trustee*, 220 Mass. 285, the writ was served on the Commissioner of Corporations as the true and lawful attorney upon whom service of process for said corporation may be made. The Supreme Court in dealing with this phase of the case stated, at page 287:

"The amended return . . . having been insufficient to show any personal service on the defendant, a foreign corporation, described in the writ as having a usual place of business at Boston in this Commonwealth, the court could not enter judgment against the company, which has appeared specially for the purpose of pleading in abatement or to move that the action be dismissed."

Although each of these cases involved an interpretation of chapter 181, section 3, Massachusetts General Laws, and although each case stated categorically that it did not apply to a non-resident interstate carrier by railroad, the Circuit Court of Appeals ignored these cases and attempted to decide the instant case by analogy. If the Circuit Court of Appeals had accepted the construction of the statute by the Massachusetts Supreme Court, as it pretended to do, it must have decided that the statute was not and never has been intended to apply to a non-resident interstate carrier by railroad.

IV.

The Statute Cannot Constitutionally be Applied to This Petitioner.

Two constitutional provisions are involved, namely, the Due Process Clause and the Commerce Clause.

THE DUE PROCESS CLAUSE.

The Circuit Court of Appeals, considering first the Due Process Clause, ruled as a matter of law that the activities of the petitioner in Massachusetts constituted doing business so as to render the petitioner liable to service of process, citing *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U.S. 218, and *Missouri, Kansas & Texas Ry. Co. v. Reynolds*, 255 U.S. 565. Neither one of these cases is applicable, and indeed it is questionable if either one of them is now the law either in the Federal Court or in the Massachusetts State Courts. In the Alexander case there was (a) a resident director of the company; (b) an agent authorized to settle claims; (c) the petitioner railroad was an integral part of a larger system known as the Cotton Belt System; (d) Banks and Trust Companies in New York, where suit was brought, had been appointed to act as registrars, trustees, transfer agents, etc., for the petitioner railroad. None of these elements is present in the case of the Canadian Pacific Railway. It is noticeable that the Alexander case has never been cited with approval on this particular question by the Supreme Court of the United States, and it probably was overruled by *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312. Moreover, the facts in the case at bar closely resemble those in *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, which has been followed by this Court in many subsequent decisions. It has cer-

tainly been greatly limited, if not overruled, by at least four later cases:

Davis v. Farmers Co-operative Equity Co., 262 U.S. 312.

Michigan Central R.R. Co. v. Mix, 278 U.S. 492.
Denver & Rio Grande Western R.R. Co. v. Terte, 284 U.S. 284.

Louisville & Nashville R.R. Co. v. Chatters, 279 U.S. 320.

The case of *Denver & Rio Grande Western R.R. Co. v. Terte*, 284 U.S. 284, goes even further than the instant case. In that case the petitioner was described as follows:

"The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado, Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic." Yet it was held that it was not doing business in Missouri, although it owned property located there.

In *Louisville & Nashville R.R. Co. v. Chatters*, 279 U.S. 320, this Court said, at page 328:

"Where jurisdiction has been denied, the cause of action not only arose outside the state, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there. . . . In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the state through the

doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the state."

The case of *Missouri, Kansas & Texas Ry. Co. v. Reynolds*, 255 U.S. 565, the other case cited by the Circuit Court of Appeals, did not involve the same statute. That case involved Statute of 1913, chapter 257, now General Laws, chapter 223, section 38. The Supreme Court of Massachusetts held that the Railroad was doing business so as to be subject to service of process. Certiorari was denied by the Supreme Court of the United States. It is settled that such a denial imports no opinion on the merits.

United States v. Carver, 260 U.S. 482.

Moreover, the Reynolds case has in effect been overruled by at least two subsequent Massachusetts cases.

Thurman v. Chicago, Milwaukee & St. Paul Ry. Co., 254 Mass. 569.

Koontz v. Baltimore & Ohio R.R., 220 Mass. 285.

The authorities cited by the Circuit Court of Appeals in support of its ruling that the petitioner was doing business in Massachusetts are no longer the law, either in the State or in the Federal Courts.

The use of trustee process or garnishment in an attempt to secure jurisdiction was void because of the purpose for which it was invoked.

Atchison, Topeka & Santa Fe Ry. Co. v. Wells,
265 U.S. 101.

Koontz v. Baltimore & Ohio R.R. Co. & trustee,
220 Mass. 285.

Denver & Rio Grande Western R.R. Co. v. Terte,
284 U.S. 284.

THE COMMERCE CLAUSE.

The petitioner also urged that the Massachusetts statute could not constitutionally be applied to it because it violated the Commerce Clause of the Constitution. The Circuit Court of Appeals, stating that the Massachusetts statute did not "unreasonably" burden interstate commerce, held that the statute was unconstitutional. The burden on and interference with interstate commerce is twofold: First, it requires a non-resident interstate carrier by railroad to take out a license before doing business in Massachusetts, and second, it requires that the Railroad as a condition precedent to doing business in Massachusetts must appoint the Commissioner of Corporations its agent for service of process. The statute is similar to the one declared unconstitutional in *Crutcher v. Kentucky*, 141 U.S. 47.

"In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States."

Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583.

Barron v. Burnside, 121 U.S. 186, 197.

Section 5 of chapter 181 of the Massachusetts General Laws provides in part as follows:

"Every foreign corporation of the classes described in section three, before transacting business in this commonwealth, shall, upon payment of the fee provided by section twenty-three, file with the commissioner a copy of its charter, articles or certificate of incorporation, certified under the seal of the state or country where such corporation is incorporated by the secretary of state thereof or by the officer having charge of the original record therein, a true copy of its by-laws, and a certificate in such form as the commissioner requires, setting forth: (a) the name of the corporation; (b) the location of its principal office; (c) the names and addresses of its president, treasurer, clerk or secretary and of the members of its board of directors; (d) the date of its annual meeting for the election of officers; (e) the amount of its capital stock, authorized and issued, the number and par value of its shares, the amount paid in thereon to its treasurer, and, if any such payment has been made otherwise than in money, the details of such payment, so far as practicable, in accordance with section ten of chapter one hundred and fifty-six. . . . The officers and directors of such corporation shall be subject to the same penalties and liabilities for false and fraudulent statements and returns as officers and directors of a domestic corporation subject to said chapter. Every officer of such a corporation which fails to comply with the requirements of this section and of sections three and twelve who authorizes or transacts, and every agent thereof who transacts business in behalf of such corporation in this commonwealth, shall for such failure, be punished by a fine of not more than five hundred dollars, and shall also be liable, jointly and severally, in contract, without prior proceedings against the corporation, for all debts and contracts of the corporation, except such as relate to interstate

commerce, contracted or entered into within this commonwealth, for the purpose of being performed therein, so long as such failure continues. . . .”

This section makes it a criminal offense for even a non-resident interstate carrier by railroad to do any business in the Commonwealth without first supplying all the information required and, second, appointing the Commissioner of Corporations its agent for service of process. It is in effect a requirement that the Railroad shall take out a license or be licensed to do business in Massachusetts before even opening a soliciting office.

The Circuit Court of Appeals decided that these conditions were not an unreasonable burden on interstate commerce. It is a new concept of constitutional law that the constitutionality of a statute should depend on such an uncertain and nebulous factor as reasonableness. The statute, if applied to such a nonresident carrier, is either constitutional or unconstitutional. To make such constitutionality depend on its reasonableness is to impose upon laymen the duty of interpreting the Constitution and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even the Courts are not in accord.

Smith v. Cahoon, 283 U.S. 553.

Buck v. Kuykendall, 267 U.S. 307.

The statute itself does not lay down any criterion of reasonableness and the law does not contemplate such a classification as the basis of determining constitutionality. It does undoubtedly impose a serious and direct burden on interstate commerce, which is repugnant to the Commerce Clause.

Davis v. Farmers Co-operative Equity Co., 262 U.S. 312.

Denver & Rio Grande Western R.R. Co. v. Terte,

284 U.S. 284.

Michigan Central R.R. Co. v. Mix, 278 U.S. 492.

In a well-considered case, the Circuit Court of Appeals for the Eighth Circuit decided that the Canadian Pacific Railway Company was not doing business in Minneapolis, although from a review of the facts in that case it is apparent that the activities of the office in Minneapolis were more extensive even than those of the office in Boston, and even though the accident involved in that case arose out of the business transacted in Minneapolis, the plaintiff in that case had bought a ticket at the Minneapolis office and was injured while a passenger on a conveyance of the defendant.

Maxfield v. Canadian Pacific Ry. Co., 70 Fed. (2d) 982.

The case of *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, cited by the Circuit Court of Appeals, is hardly in point, inasmuch as the Columbia Transportation Company frequently sent its vessels into the jurisdiction where the writ was served and in this particular case a physical attachment of one of the vessels had been made.

V.

The Opinion of the Circuit Court of Appeals is Repugnant to the Fifth Amendment, Contrary to the Recognized Judicial Procedure and in Conflict with the Decisions of This Court or the Circuit Courts of Appeals and the State Courts.

These three points all involve the same principles and may be considered together. In its opinion the Circuit

Court of Appeals has ignored and disregarded certain well-established rules.

The Due Process Clause of the Fifth Amendment to the Constitution provides that no person shall be deprived of his property without due process of law.

This clause is binding on the judicial department of the Government as it is on the legislative.

Hovey v. Elliott, 167 U.S. 409.

Due process of law must be a course of legal proceedings according to the rules and forms which have been established for the protection of private rights.

Burton v. Platter, 53 Fed. 901.

The established rules and forms require that findings of fact cannot be founded on mere surmise, guesswork, suspicion or imagination; a solid foundation of credible evidence alone will support a verdict.

Atchison, Topeka & Santa Fe Ry. Co. v. Toops,
281 U.S. 351.

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan,
271 U.S. 472.

Patton v. Texas and Pacific Ry. Co., 179 U.S.
658.

Troutman v. Insurance Co., 125 Fed. (2d) 769.

Mucha v. Northeastern Crushed Stone Co., 307
Mass. 592.

Childs v. American Express Co., 197 Mass. 337.

The cases could be multiplied indefinitely, but the law is so clear that it seems hardly necessary to do so. The same

cases support the statement that, whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed, and that the fact of accident carries with it no presumption of negligence on the part of the defendant; it is an affirmative fact for the plaintiff to prove. The law was well stated in *Patton v. Texas and Pacific Ry. Co.*, 179 U.S. 658, on page 663, a case involving the Employers' Liability Act, where the Court stated:

“The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. . . . in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.”

In the case now before this Court, the Circuit Court of Appeals has said that, because of the accident, the jury might have found that it was caused either by inability to

stop the train or by ability to stop the train and failure to do so. In the former case the Circuit Court of Appeals said that, if the jury should find that the accident was caused by inability to stop the train, they might find that the defendant was negligent in operating the train either at too great a speed or with defective brakes. There was absolutely no evidence from which the jury could find that the train could not be stopped, that it was operated at too great a rate of speed, or that the brakes were defective. The entire basis for a finding would be surmise and conjecture based on sympathy. On the other hand, the Circuit Court of Appeals says that the jury might find the train could be stopped and the negligence of the defendant consisted in the failure to stop it. There is no evidence in the case, and the Circuit Court of Appeals tacitly admits this, from which the jury could find that the train might have been stopped. It seems clear that the Circuit Court of Appeals in its opinion has disregarded the elementary rule of burden of proof and testimony governing the conduct of a jury trial. If the opinion of the Circuit Court of Appeals is allowed to become the law of the land, a railroad, at least one subject to suit in the Courts of the First Circuit, becomes absolutely liable for any accident on its grade crossings irrespective of negligence. This is contrary to the decisions of this Court.

Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66.

Western & Atlantic R.R. Co. v. Henderson, 279 U.S. 639.

It is contrary to the decisions of other Circuit Courts of Appeal.

Southern R.R. v. Stewart, 119 Fed. (2d) 85 (C.C.A. 8th).

Hickey v. Missouri Pacific R.R. Co., 8 Fed. (2d) 128, 130 (C.C.A. 8th).
Garrett v. Pennsylvania R.R., 47 Fed. (2d) 10 (C.C.A. 7th).
Hartman v. Baltimore & Ohio R.R., 89 Fed. (2d) 425 (C.C.A. 4th).

It is unnecessary to cite cases from every Circuit. The opinion is contrary to the decisions of the State Courts.

Caledonian Insurance Co. v. Erie R.R. Co., 219 App. Div. 685, 220 N.Y.S. 705.
Davis v. New York, New Haven & Hartford Railroad, 272 Mass. 217.
22 R.C.L. "Railroads," section 98.

This Court should not allow such a decision to become the law of the land in the First Circuit.

VI.

The Evidence is Not Sufficient to Sustain a Finding that Any Negligence on the Part of the Petitioner Caused or Contributed to the Accident.

From the state of the record, the breach of duty relied on to sustain the verdict is somewhat doubtful. Three grounds appear: First, failure to stop the train; second, inability to stop the train, and third, failure to blow the whistle. The first two have already been dealt with, and as to the third, there is no credible testimony that the whistle was not blown. The testimony of the plaintiff Margaret Sullivan was so contrary to and inconsistent with the known physical facts that it was not worthy of belief.

22 R.C.L. page 1056, section 289, and cases cited.

VII.**Conclusion.**

The petitioners urge that the writ of certiorari should issue because—

1. No jurisdiction was obtained over the petitioner.
2. The Circuit Court of Appeals erred on deciding the jurisdictional question, in that—
 - (a) It neglected to consider the interpretation of the statutes placed on them by the Massachusetts Courts.
 - (b) It ruled that the petitioner was doing business in Massachusetts.
 - (c) It ruled that the Massachusetts statute was constitutionally applicable in this case.
3. The decision of the Circuit Court of Appeals is contrary to the decisions of the United States Supreme Court, the decisions of other Circuit Courts of Appeals and the decision of the State Courts.
4. The judge at the trial, in the exercise of his duty, should have directed the jury to return a verdict for the defendant.

Wherefore your petitioner prays that a writ of certiorari issue from this Court directed to the Circuit Court of Appeals.

Respectfully submitted,

RICHARD W. HALL,

Attorney for the Petitioner.

